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No. 09-1259

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN LONBERG,

Petitioner,

v.

CITY OF RIVERSIDE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS ADVOCATES AND DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Americans with Disabilities Act's transition plan regulations, 28 C.F.R. § 35.150(d), are enforceable by private right of action.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	3
ARGUMENT	4
I. Summary	4
II. ADA Title II Is Properly Understood to Include a Transition Plan Requirement	6
A. By Explicitly Cross-Referencing Previous Section 504 Regulations that Include a Transition Plan Requirement, Section 12134 Creates a Clear Congressional Mandate for ADA Title II Transition Plans	6
B. The Court Has Already Confirmed Clear, Long-Standing Congressional Intent to "Endorse" the Previous Section 504 Regulations that Are Cross-Referenced in Section 12134	9
III. Congress Clearly Provided for an Expansive Private Right of Action to Enforce ADA Title II	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901 (6th Cir. 2004) 3, 8

Alexander v. Choate, 469 U.S. 287 (1985) 9, 10

Alexander v. Sandoval, 532 U.S. 275 (2001) 5, 10

Barnes v. Gorman, 536 U.S. 181 (2002) 13

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 13

Chaffin v. Kan. State Fair Bd., 348 F.3d 850 (10th Cir. 2003) 3

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 5, 10

Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) 9, 10, 11, 12

Cort v. Ash, 422 U.S. 66 (1975) 13

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) 14

Franklin v. Gwinett County, 503 U.S. 60 (1992) 13

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) 10

Iverson v. City of Boston, 452 F.3d 94 (1st Cir. 2006) 3

Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982) 14, 15

TABLE OF AUTHORITIES - Continued

Page

STATUTES

Americans with Disabilities Act ..... *passim*

Americans with Disabilities Act, Title II ..... *passim*

Americans with Disabilities Act, Section 205 13

Civil Rights Act of 1964, Title VI 10, 12, 13

Civil Rights Act of 1964, Title VI, Section 604 10

Civil Rights & Remedies Equalization Act of 1986 11

Civil Rights Restoration Act of 1987 12

Rehabilitation Act of 1973 ..... 12, 14, 15

Rehabilitation Act of 1973, Section 504 ..... *passim*

Rehabilitation Act of 1973, Section 505 ..... 12, 13

Rehabilitation Act Amendments of 1974 12

Rehabilitation Act Amendments of 1992 12

Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978 12

29 U.S.C. § 794 9

29 U.S.C. § 794a(a)(2) 12

42 U.S.C. § 12131 13

42 U.S.C. § 12133 4

42 U.S.C. § 12134 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12134(a) 7

42 U.S.C. § 12134(b) 7, 10, 15

REGULATIONS

Code of Federal Regulations, Title 28, Part 35 7

Code of Federal Regulations, Title 28, Part 39 (January 13, 1978) 6, 7, 11

Code of Federal Regulations, Title 28, Part 41 (January 13, 1978) 6, 11

28 C.F.R. § 35.150(d)(1) 3

28 C.F.R. § 39.150(d) 7

45 C.F.R. § 84.22(e), 42 Fed. Reg. 22681 (May 4, 1977) 11

LEGISLATIVE MATERIALS

H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. 1990, *reprinted in* 1990 U.S. Code Cong. & Admin. News 445 14

S. Rep. No. 1297, 93rd Cong., 2d Sess., 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373 12

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Exec. Order 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980) 11

National Council on Disability, *The Impact of the Americans with Disabilities Act: Assessing the Progress Toward Achieving the Goals of the ADA* (Jul. 26, 2007) 4

U.S. Department of Justice, Civil Rights Division, *The ADA and City Governments: Common Problems* (Oct. 9, 2008) 4

BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS ADVOCATES AND DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC. IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

This case presents whether persons with disabilities have a private right of action to force public entities to comply with the transition plan requirement of the Americans with Disabilities Act ("ADA"). That is an issue of grave concern to *amici* – disability rights organizations well-aware of the substantial and inevitable physical barriers to access persons with disabilities face when public entities neglect to identify access problems and create a plan to resolve them.

The predictable result of a public entity's failure to prepare and implement a transition plan is that access barriers in existing facilities will not be corrected proactively as required by the ADA. Instead, such barriers will go unidentified and uncorrected until persons with disabilities encounter the barriers, are denied access to a public entity's programs,

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[1] Pursuant to the Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Pursuant to Rule 37.2, counsel of record for both Petitioner and Respondent were timely notified of the intent to file this brief and the parties' written consents to the filing of this brief have been filed with the Clerk's office.

services and activities as a result, and then face the lengthy process of petitioning governmental officials, and, if necessary, suing the public entity under the ADA to remove the barrier. By requiring public entities to self-identify barriers to access and plan for their removal, Congress meant to avoid subjecting people with disabilities to denials of access in the first place. *Amici* hope that the Court will affirm the right of persons with disabilities to enforce the congressional demand of a transition plan requirement. As discussed below, Congress clearly expressed its intent that the requirements it imposed under the ADA be broadly enforceable by private litigants.

Amicus curiae Disability Rights Advocates ("DRA") is a nonprofit public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. Based in Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities.

Amicus curiae Disability Rights Education and Defense Fund ("DREDF") is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains

board- and staff-led by members of the disability community. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

REASONS FOR GRANTING THE PETITION

This case presents issues of tremendous importance to all persons with disabilities. In the decision below, the Ninth Circuit held that there is no private right of action to enforce the ADA's transition plan requirement. Such a private right of action exists for persons with disabilities in the Tenth Circuit, but not for those in the First, Sixth and now, Ninth Circuits.[2] This is precisely the sort of outcome-determinative conflict among the courts of appeals the Court seeks to resolve.

The deadline set by the ADA for public entities to develop a transition plan was 1992.[3] The sad reality, however, is that scores of public entities nationwide have disregarded their obligation to create a transition plan. The U.S. Department of Justice, Civil Rights Division lists noncompliance with the transition plan

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[2] *See Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004); *Iverson v. City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003).

[3] 28 C.F.R. § 35.150(d)(1).

among "common problems" with ADA compliance. *The ADA and City Governments: Common Problems* (Oct. 9, 2008), available at http:www.ada.gov/comprob.htm. Producing reliable data on transition plan noncompliance is challenging, since as the National Council on Disability observed, "[d]ata collection on ADA compliance efforts [is] difficult" and "[r]ecords of adoption of, and progress on, transition plans are de-centralized." *The Impact of the Americans with Disabilities Act: Assessing the Progress Toward Achieving the Goals of the ADA* 23 (Jul. 26, 2007), available at http://www.ncd.gov/newsroom/publications/2007/ada_impact_07-26-07.htm. Still, *amici*'s experience is the same as the Civil Rights Division's: noncompliance with the transition plan requirement is common and widespread.

ARGUMENT

I. SUMMARY.

In enacting Title II of the ADA, Congress made two explicit statutory cross-references and incorporations that unequivocally govern this case: (1) it mandated that the regulations promulgated to define and implement the ADA must be consistent with previous regulations under Section 504 of the Rehabilitation Act of 1973, and (2) it mandated that Section 504 remedies must be available to enforce Title II. *See* 42 U.S.C. §§ 12134 and 12133. The cross-referenced Section 504 regulations have for decades prior to the

ADA explicitly included a transition plan requirement, and the incorporated remedies provide for a private right of action. Moreover, the Court has previously held that the long-standing Section 504 regulations (which include explicit transition plan requirements) have been codified by Congress. Accordingly, congressional action and intent in explicitly modeling ADA Title II on Section 504 establish that ADA Title II includes a transition plan requirement that is enforceable by private right of action. *Amici* further agree with Petitioner that a correct application of the principles laid out in the Court's *Sandoval* and *Chevron* decisions would also confirm this remedy.[4] However, analysis under *Sandoval* and *Chevron* is not needed given the unique and definitive statutory structure and legislative history of Section 504 and ADA Title II.

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[4] *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

II. ADA TITLE II IS PROPERLY UNDERSTOOD TO INCLUDE A TRANSITION PLAN REQUIREMENT.

A. By Explicitly Cross-Referencing Previous Section 504 Regulations that Include a Transition Plan Requirement, Section 12134 Creates a Clear Congressional Mandate for ADA Title II Transition Plans.

On the merits, the question presented is neither close nor complex. The ADA provides *in the language of the statute* that Title II regulations must be consistent with those promulgated under the Rehabilitation Act:

> **Relationship to other regulations**
>
> Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. *With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations*, applicable to federally conducted activities under section 794 of title 29.

42 U.S.C. § 12134(b) (emphasis added).[5] Included among these "part 39" Rehabilitation Act regulations was an explicit transition plan requirement. 28 C.F.R. § 39.150(d). A fundamental canon of statutory construction is to start with the plain meaning of the words of a statute. Here, those words were clear as a bell: the Title II regulations to be developed by the U.S. Department of Justice ("DOJ") must be consistent with the existing Section 504 regulations. The ADA regulation requiring a transition plan (28 C.F.R. § 35.150(d)) thus is not merely an administrative interpretation of the statute – it is better described as a regulation required by Congress itself. Had the ADA regulations not included the affirmative transition plan requirement of the Rehabilitation Act regulations, they would have been unlawfully *in*consistent with 42 U.S.C. § 12134(b).

While the Ninth Circuit ignored 42 U.S.C. § 12134(b) in the decision below, the Sixth Circuit acknowledged this subsection's significance: "Plaintiffs' best potential argument for an implied obligation might be that, by mandating the adoption of program accessibility regulations consistent with

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[5] The preceding subsection, 42 U.S.C. § 12134(a), provides explicit statutory authority for the U.S. Department of Justice to issue Title II ADA regulations, authority that was exercised in the promulgation of 28 C.F.R. Part 35. By directing in subpart (b) of the Title II provision at issue (42 U.S.C. § 12134) that the DOJ regulations be consistent with those already existing under Section 504, Congress mandated the substance of the Title II regulations to be developed.

Rehabilitation Act regulations * * * Title II does contemplate that public entities are required to adopt transition plans." *Ability Ctr. of Greater Toledo*, 385 F.3d at 914.[6]

While the Sixth Circuit erred in its holding, it was correct in highlighting the paramount importance of the ADA's interactions with the Rehabilitation Act. Because the Title II statute mandated consistency with previous Section 504 regulations that included explicit transition plan requirements, the text of Section 12134 is, in itself, sufficient to confirm that Congress intended Title II to require public entities to prepare and implement transition plans for their existing facilities.

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[6] Nonetheless, the Sixth Circuit refused to recognize a private right of action to enforce the transition plan requirement. To do that, the Sixth Circuit would require a "stronger, more explicit indication from the statute itself that Congress viewed the creation of transition plans as integral to the achievement of the statute's aims or that Congress considered a public entity's failure to adopt such a plan as a form of discrimination against disabled individuals or as a failure to provide them with meaningful access to public services." *Ibid.* The Sixth Circuit went astray, however, in ignoring the plain meaning of the terms of the ADA statute. Moreover, as discussed below, the congressional "endorsement" of Section 504 regulations provides any necessary confirmation that Congress views *all* aspects of those regulations – including the transition plan requirement – as integral to its ADA statutory purpose.

B. The Court Has Already Confirmed Clear, Long-Standing Congressional Intent to "Endorse" the Previous Section 504 Regulations that Are Cross-Referenced in Section 12134.

Since 1978, the general congressional Section 504 nondiscrimination mandate on which ADA Title II was modeled has been properly understood to include *all* of the detailed requirements set out in original Section 504 regulations – including a transition plan requirement. As recognized by the Court, Congress effectively acted over three decades ago to "endorse" these regulations.[7]

As originally enacted in 1973, Section 504 of the Rehabilitation Act established a disability nondiscrimination mandate in broad and general language. *See* 29 U.S.C. § 794, Pub. L. 93-112, 87 Stat. 355, 394 (1973). If this text was the *only* thing available to aid in interpretation of that mandate, there perhaps might be a question as to whether a transition plan requirement is appropriately included within its sweep. But this general 1973 mandate was subsequently

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[7] The Court has emphasized the need to examine legislative history when faced with questions concerning the scope of Section 504 and its remedial provisions, and has consistently refused to interpret Section 504 as containing limitations inconsistent with clear congressional purposes. As the Court stated in *Consolidated Rail Corp. v. Darrone* ("*Conrail*"), 465 U.S. 624, 633 n.12 (1984), "language as broad as that of § 504 cannot be read in isolation from its history and purposes."; *see also Alexander v. Choate* ("*Choate*"), 469 U.S. 287 (1985).

defined *with particularity* in Section 504 regulations that were themselves – in the words of the Court – subsequently "endorsed" and "codified" by Congress. *See Consolidated Rail Corp. v. Darrone* ("*Conrail*"), 465 U.S. 624 at 632, 636. This series of developments is clearly evident from examination of Section 504 legislative history, as confirmed in high court jurisprudence.[8]

As recounted by the Court in *Conrail*, the then-existing U.S. Department of Health, Education and Welfare ("HEW") was "the agency designated by the President to be responsible for coordinating enforcement of § 504." 465 U.S. at 632 (*citing* Exec. Order

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[8] In *Conrail*, the Court based on legislative history held that Congress had not intended to incorporate into Section 504 the employment limitation of Section 604 of Title VI of the Civil Rights Act of 1964. In *Choate*, the Court addressed the question of whether Section 504 prohibited disparate-impact discrimination. Despite the holding of a majority of the Court in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), that Title VI itself did not prohibit disparate-impact discrimination, the *Choate* Court declined to extend this limitation on the scope of Title VI to Section 504, again basing decision on the legislative history of Section 504.

Subsequent to both *Guardians* and *Choate*, of course, the Court again addressed the issue of disparate impact in *Sandoval*. But *Sandoval*, like *Guardians*, was focused on Title VI, and thus must be carefully examined to determine whether and how it might apply to a Section 504 context. Regardless, given the explicit congressional endorsement of Section 504 regulations contained in 42 U.S.C. § 12134(b), there is no need to even reach *Sandoval* questions here, or to conduct an analysis of rule-making authority pursuant to *Chevron*.

No. 11914 (1976)). The *Conrail* Court noted that these original HEW regulations "particularly merit deference" because "the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself *endorsed the regulations in their final form*." *See Conrail*, 465 U.S. at 632 (emphasis added); *see also* 465 U.S. at 635 (noting congressional action to "codify" the specific regulatory provision at issue in *Conrail*). As promulgated in 1977, the original HEW Section 504 regulations expressly included a transition plan requirement. *See* former 45 C.F.R. § 84.22(e), 42 Fed. Reg. 22681 (May 4, 1977).[9]

Conrail was decided in 1984. In the years since then, Congress has *repeatedly* acted to reauthorize and amend Section 504.[10] In *none* of those actions has

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[9] In 1979 HEW was split into two separate agencies, the U.S. Department of Health and Human Services and the U.S. Department of Education. Following this split, coordinating authority for the development of Section 504 regulations passed to the DOJ, where it remains. *See* Exec. Order 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980). Thus, when Congress passed the ADA in 1990, it looked to DOJ regulations to provide Section 504 definition. But those DOJ regulations – in the form of both the "part 41" and "part 39" promulgations referenced by ADA Section 12134 – simply repeat the detailed requirements contained in the original HEW regulations that the Court acknowledges were "endorsed" by Congress. Thus, that original regulatory detail gives meaning to the Title II nondiscrimination mandate itself.

[10] In addition to the Section 504 amendments accomplished by the ADA in 1990, significant Section 504 amendments include the Civil Rights & Remedies Equalization Act of 1986, Pub. L.

(Continued on following page)

it objected to the Court's characterization in *Conrail* of a congressional "endorsement" of Section 504 regulations.

III. CONGRESS CLEARLY PROVIDED FOR AN EXPANSIVE PRIVATE RIGHT OF ACTION TO ENFORCE ADA TITLE II.

In the first set of amendments to the Rehabilitation Act in 1974, Congress expressed its intent that enforcement of Section 504 "permit a judicial remedy through a private action."[11] This congressional commitment to a Section 504 judicial enforcement scheme was reaffirmed in 1978, with the incorporation of Title VI remedies into the Rehabilitation Act.[12] This was, notably, the *same* legislation that accomplished the congressional endorsement of Section 504 regulations that has been acknowledged by the Court. *See Conrail*, 465 U.S. at 632, 635.

99-506, 100 Stat. 1807 (Oct. 21, 1986); the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (Mar. 22, 1988); the Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344 (Oct. 29, 1992).

[11] S. Rep. No. 1297, 93rd Cong., 2d Sess., 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6390. Specifically, these amendments were accomplished through the enactment of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1617 (Dec. 7, 1974).

[12] *See* Section 505(a)(2), 29 U.S.C. § 794a(a)(2), as added by the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955 (Nov. 6, 1978).

Title VI remedies are, of course, relevant to the ADA, given the incorporation of Title VI into Section 504, and the further incorporation of Section 504 remedies into ADA Title II. *See Barnes v. Gorman*, 536 U.S. 181, 185 (2002). But the Court has recognized that in analyzing any remedial incorporation, "we evaluate the state of the law when the legislature passed" the statute in question. *See Franklin v. Gwinett County*, 503 U.S. 60, 71 (1992).

As the *Franklin* Court noted, in enacting and amending the nondiscrimination laws of the 1960s and 1970s, Congress legislated against the backdrop of a clear and long-standing "traditional presumption in favor of all appropriate relief," as well as an assumption that legislative history would be taken into account in assessing available remedies.[15]

Such history is indeed instructive as to both Section 504 and the ADA Title II. In enacting both statutes, and in amending Section 504, Congress expressed its clear intent to create very broad remedial rights. This is confirmed in the legislative history addressing the remedial provisions set out in Section 205 of the ADA, 42 U.S.C. § 12131:

> Section 205 incorporates the remedies, procedures and rights set forth in Section 505 of

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[15] *Ibid. See also Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Cort v. Ash*, 422 U.S. 66 (1975) (identifying legislative history and intent as critical to judicial determination of whether a remedy has been created by statute).

> the Rehabilitation Act of 1973. * * * The Rehabilitation Act provides a private right of action, with a *full panoply of remedies* available, as well as attorney's fees. [fn].

H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. 1990, *reprinted in* 1990 U.S. Code Cong. & Admin. News 445, 475 (emphasis added).

A "full panoply of remedies" is broad remedial language, as the Court has recognized in another context.[14] Moreover, in the passage quoted above, the committee cited (in the footnote in the passage above, no. 62 in original) a single case to illustrate the remedial structure of the Rehabilitation Act: *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982).

It would be difficult to find a case with a more expansive view of private rights of action available to persons with disabilities than *Miener*. There, the court interpreted the remedies under the Rehabilitation Act broadly to provide all ordinary remedies necessary to right a wrong, including an implied right to seek damages. *Id.* at 978 ("We indulge the presumption * * * that a wrong must find a remedy, and in light of the inadequacy of administrative remedies, conclude that damages are awardable"). Furthermore, the court held that a person with disabilities

[14] *See, e.g., Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 648 n.11 (1999) (Court viewed House committee's intent to provide the "full panoply of remedies provided in the patent law" as evidence of congressional intent to create broad remedial rights.).

need not exhaust administrative remedies prior to bringing suit under the Rehabilitation Act. *Ibid.* On a variety of remedial issues, the *Miener* court observed substantial divisions of authority in the circuit courts, and sided each time in favor of expansive private enforcement rights for persons with disabilities. *Id.* at 975-78.

Since Congress expressed its intent to provide persons with disabilities a "full panoply of remedies" to enforce their rights under the ADA, and embraced *Meiner* for its broad holdings regarding remedies, there can be no doubt that Congress intended to provide a private right of action to enforce the ADA Title II requirements, including the transition plan requirement which was legislatively mandated under 42 U.S.C. § 12134(b).

Failure by a public entity to comply with the transition plan requirement is unquestionably a "wrong" against persons with disabilities, who are the intended beneficiaries of the transition plan requirement. Righting that wrong is a simple matter of mandating that public entities comply with federal law. To that end, Congress has established a clear path to compliance by enacting the Title II nondiscrimination mandate, explicitly cross-referencing it to long-standing Section 504 regulations, and providing for enforcement through an unquestionably expansive remedial scheme. The Court should take this case to

confirm this clear statutory mandate and require all Circuits to implement what Congress intended.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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